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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARIO ALBERTO PICHARDO, Defendant and Appellant.	B203615 (Los Angeles County Super. Ct. No. LA051840)

APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene E. Schempp, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Mario Alberto Pichardo stabbed Robert R. during a fight outside a party. He was convicted of attempted murder and mayhem, with enhancements for use of a deadly weapon, infliction of great bodily injury, and committing the crime to benefit a street gang. He was also convicted of possession of methamphetamine, as that drug was found on his person when he was arrested. He was sentenced to a total of 21 years eight months in prison.

Appellant contends: (1) The trial court should have given CALJIC No. 5.17 sua sponte, to inform the jury that malice could be negated through an unreasonable belief in the need for self-defense (imperfect self-defense). (2) The trial court should have excluded People's exhibit No. 25, one of the photos of him.

We find no error in the failure to give CALJIC No. 5.17, as the issue of imperfect self-defense was covered by another instruction that was given. We further find that the failure to exclude People's exhibit No. 25 was nonprejudicial error. We therefore affirm.

FACTS

On the evening of November 7, 2004, Vicky P. celebrated her birthday by throwing a large party at a rented dance hall in Woodland Hills. The guests were required to wear black or white semi-formal clothing. Alcoholic beverages were provided. The guests were not allowed to bring their own liquor into the party.

Rene Flores, whom Vicky had known for years, was one of the invitees. He belonged to the Haskell Street Locos gang. His gang name was "Trippy." He arrived at the dance hall with two other members of his gang, appellant and "Sal." Appellant's gang name was "Grumpy."

Flores, appellant, and Sal were not allowed inside the party, as they were not wearing the required clothing and had brought their own liquor. They remained outside near Flores's car. Cindy Q., one of Vicky's cousins, came outside and talked to them around 11:00 p.m.

Around 1:00 a.m., as Vicky's party was ending, appellant, Flores, and Sal had an argument with some people in a car who were leaving another party down the street. As

the car drove away, appellant, Flores, and Sal threw a beer can at it while yelling "Haskell Street" and displaying gang signs.

Ten or 15 people from Vicky's party were already outside or came outside at that point. They included Vicky and her boyfriend; Vicky's female cousin Leslie Q.; Vicky's male cousins Juan Q., Jose Q., and Luis Q.; and two guests, Robert R. (the stabbing victim) and Karla G. Many of them testified at the trial. They described how the situation quickly deteriorated into a "big brawl," in this way:

Vicky and her boyfriend asked Flores to leave. Flores argued heatedly with Leslie, who complained that Flores was "trying to ruin the party." Leslie punched Flores in the chest. Flores pushed Leslie to the ground. Juan pushed Flores. Flores, appellant, and Sal started to walk away while repeatedly saying "Haskell Street." Appellant also yelled out, "Grumpy." Suddenly, Flores walked to Juan and Jose and swung at Jose. Jose punched Flores in the chin, knocking him to the ground. Flores got up and fought with Juan, Jose's brother. Appellant and Sal ran back and jumped on Jose. Luis and Robert became involved in the fighting. Other people tried to stop it.

During the struggle, Robert pulled appellant and Sal off of Jose, pushed appellant away, and used his foot to hold Sal on the ground. Two witnesses, Juan and Karla, saw appellant pull out an object and walk toward Robert, who was facing in the opposite direction. Using a kind of "bear hug," appellant reached around Robert and stabbed him in the chest and right arm. Robert yelled that he had been stabbed. Appellant, Flores, and Sal left in Flores's car, shouting "Haskell Street."

Robert was taken by ambulance to a hospital. The wound to his arm was so deep that it cut down into tendons and muscle. He testified at the trial that, despite two surgeries and months of therapy, he was left with limited use of his right arm and hand.

On November 11, 2004, several days after the stabbing, police officers executed a search warrant at appellant's home. Appellant was not present at the time. The officers seized three photographs of him that showed his allegiance to his gang. He was arrested outside his home over six months later, on May 29, 2005. Methamphetamine was found on his person. Two other photos were seized when his home was searched that day.

Appellant made a recorded statement to a police detective following his arrest. He said he realized he made "a big mistake" at the party. He went there with Trippy and another friend. There was a dispute with some people in a car regarding whose "neighborhood" it was. He briefly chased the car as it drove away. As he walked back, 30 or 40 people came out from the party and approached him and his friends. Someone yelled, "[K]eep the bulls--- out of here." Appellant told the people he did not want "drama" and just wanted to leave. People started yelling and pushing him and his friends. He felt fists on his face and head. A man was holding onto one of his friends. Appellant and his friends kept saying that they only wanted to leave. Then, appellant started swinging back at the people who were swinging at him. He heard a man twice say words like, "Stab that fool." He reacted by pulling out his knife. He saw a hand swing toward his head. He did not see a knife in the person's hand. He stabbed a person, to defend himself and his friend.

At the conclusion of the interview, appellant said, "I'm looking at some time and, you know, what -- I'm trying to get myself out of it because --."

Finally, a gang expert testified that the stabbing occurred to benefit appellant's gang, as the gang's name was yelled out and appellant would be expected to assist other members of his gang during a fight. The expert described the typical gang behavior shown in the photos and also discussed an additional photo, which showed appellant and another gang member holding guns.

DISCUSSION

1. CALJIC No. 5.17

The prosecution's witnesses indicated that, during the fight, appellant ran up to Robert from behind, placed him in a bear hug, and stabbed him. On the other hand, appellant told the police detective that the stabbing occurred after someone said, "Stab that fool," and he saw a hand swing toward his head.

Appellant contends that the trial court should have given CALJIC No. 5.17 sua sponte, to fully instruct the jury on imperfect self-defense. (See *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178.) The contention lacks merit because, unlike the jury

in *Vasquez*, the jury here was instructed on imperfect self-defense, as it received CALJIC No. 8.41.

There were several possibilities for the jury's verdict: attempted murder with premeditation and deliberation, attempted murder, attempted voluntary manslaughter, and not guilty. During final argument, the prosecutor sought a verdict of attempted murder with premeditation and deliberation, arguing that appellant lied to the detective about hearing the words, "Stab that fool." Defense counsel sought a not guilty verdict, maintaining that appellant told the truth to the detective, so the stabbing resulted from a reasonable belief in the need for self-defense. The jury found appellant guilty of attempted murder, which means it found malice aforethought but not premeditation and deliberation.

The jury instructions explained the elements of attempted murder, attempted murder that is premeditated and deliberated, and attempted voluntary manslaughter. The instructions also explained the pertinent defenses.

In particular, CALJIC No. 8.66, the instruction that defined attempted murder, explained that attempted murder requires "express malice aforethought, namely, a specific intent to kill unlawfully another human being." CALJIC No. 8.41, the instruction defining attempted voluntary manslaughter, indicated that attempted voluntary manslaughter was the appropriate crime for an attempted unlawful killing without malice aforethought, and malice aforethought did not exist "if the attempted killing occurred . . . in the actual but unreasonable belief in the necessity to defend oneself or another person against imminent peril to life or great bodily injury." (Brackets omitted.) The jury also received CALJIC No. 17.10, which indicated that if the jury was not convinced that appellant was guilty of attempted murder, it could convict him of attempted voluntary manslaughter.

Appellant maintains, for the first time on appeal, that CALJIC No. 8.41 was insufficient and the court should have given CALJIC No. 5.17, the instruction for the completed crime of voluntary manslaughter. According to appellant, the jury here was not clearly instructed that the appropriate verdict was attempted voluntary manslaughter

if it believed appellant had an honest but unreasonable belief in the need for self-defense. That argument is not convincing because the subject was covered in CALJIC No. 8.41, the victim in this case did not die, and it would have confused the jury to instruct on voluntary manslaughter in addition to attempted voluntary manslaughter.

Appellant further argues that the lack of CALJIC No. 5.17 made a difference because, during deliberations, the jury asked for a definition of malice aforethought and wanted to know if it could find attempted manslaughter if it was deadlocked on attempted murder. The trial court responded by repeating instructions it had already given that answered those questions. In our view, the request for instruction during deliberations does not support appellant's argument, and simply shows that the jury deliberated carefully using appropriate instructions before it reached its verdict.

2. People's Exhibit No. 25

The charges included an allegation that the crime was committed to benefit a criminal street gang. The facts showed that appellant belonged to the Haskell Street Locos gang and shouted that gang's name after the stabbing. There also were a number of photos that showed appellant and other members of that gang engaging in activities like making gang symbols with their hands and standing proudly under gang graffiti.

Appellant contends that the trial court committed "state and federal constitutional error" when it refused to exclude one specific photo, People's exhibit No. 25, the only photo with guns in it.[1] People's exhibit No. 25 shows appellant and two other young men standing against a wall with a bicycle in front of them. All three are displaying hand signs of the letter "H," the symbol of the gang. Appellant and one of the men are also

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[1] Defense counsel's objection was sufficient to alert the trial court that the problem concerned Evidence Code section 352 (section 352), so we reject respondent's suggestion that appellant waived the section 352 objection by not specifically naming that section. Although there was no specific objection on the ground of a denial of due process under the Fifth and Fourteenth Amendments of the United States Constitution, a finding of waiver of the federal claim would be inappropriate, as a defendant may argue on appeal that an error in overruling a trial court objection "had the legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 431.)

holding handguns against their bodies, at waist level. The guns are not pointed at anyone and do not stand out. The display of gang signs is more prominent in the picture than the guns.

People's exhibit No. 25 is also the only photo with an unclear origin. The other photos were seized in searches of appellant's home. The prosecutor said he believed that People's exhibit No. 25 was recovered during a different investigation, but he would have to ask the detective about that. He wanted to introduce People's exhibit No. 25 because he anticipated that the gang expert would testify that gangs glamorize a lifestyle that includes guns. Defense counsel objected based on lack of foundation and the lack of involvement of a gun in this case. The trial court overruled the objection on the ground that People's exhibit No. 25 showed the "gang lifestyle."

During his testimony, the gang expert discussed various photos. As to People's exhibit No. 25, he gave the names of the two gang members who were in the photo with appellant. He further explained that gangs took photos of their members holding guns for several reasons, including to present "a glamorous view" of criminal activity, to instill loyalty in members of their gang, and to frighten the public.

Defense counsel's objection to People's exhibit No. 25 was renewed before the exhibit was admitted into evidence.

Appellant contends that People's exhibit No. 25 should have been excluded, as the charges did not concern a gun and there was no need for that particular photo, given the other photos that amply showed appellant's gang membership.

Assuming arguendo that People's exhibit No. 25 should not have been introduced, the error was harmless, under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, or *Chapman v. California* (1967) 386 U.S. 18, 24. The jury knew that the case involved a stabbing and not the use of a gun. Appellant admitted that he committed the stabbing. The case was replete with evidence that he was a gang member. Aside from the presence of the guns, People's exhibit No. 25 is no different than the other photos that showed appellant and his companions proudly displaying their gang membership. We

therefore conclude that erroneous admission of People's exhibit No. 25 caused no possible prejudice.

DISPOSITION

The judgment is affirmed.

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FLIER, J.

We concur:

COOPER, P. J.

RUBIN, J.